86-762

SUPREME COURT OF THE UNITED STATES

MICHAEL CARDO,

Appellant,

against

JOSEPH A. MURPHY, JR., as Personnel Director, New York State Department of Correctional Services and MICHAEL MOSHER, as Special Subjects Supervisor, Green Haven Correctional Facility,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

For Appellant:

MICHAEL CARDO, Pro Se
60 Kirby Close
Yorktown Heights, New York 10598
Phone: 914 245 4359

For Respondents:

ROBERT ABRAMS
Attorney-General, New York State
Two World Trade Center
New York, New York 10047
Phone: 212 488 3447

Litigation Bureau:

JUDITH T. KRAMER
JAN P. RYAN
CHRISTOPHER KEITH HALL

Assistant Attorneys-General

QUESTIONS PRESENTED:

1. Whether the New York State Court's finding that respondents acted in good faith necessarily decided petitioner's First Amendment claim.

2. Whether the New York State Courts denied petitioner due process by denying him the right to carry his burden of proof on his First Amendment claim.

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TABLE OF AUTHORITIES:

DECISIONS BELOW:

New York Supreme Court, Dutchess County, Index No. 4927/83, December 20, 1983.

New York Supreme Court, Appellate Division, Second Department, Docket No. 2308 E. 104AD2d 884 October 9, 1984.

United States District Court, Southern District of New York, 85 CIV 2503 CLB, decided June 17, 1985.

United States Court of Appeals, Second Circuit, 85-7561, decided January 13, 1986.

STATEMENT OF JURISDICTION:

The date of entry of the judgment sought to be reviewed is January 13, 1986.

This Court has jurisdiction to review the above judgment under 28 USC 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

United States Constitution, Amendments One and Fourteen. 42 USC 1983.

New York Civil Practice Law and Rules, Section 7804.

STATEMENT OF THE CASE:

The basis for federal jurisdiction in the District Court is 28 USC 1343(a)(3). Petitioner applies for writ of certiorari in accord with Rule 17 on grounds that the decision of the Court of Appeals conflicts with the decision of the Eighth Circuit Court of Appeals on the same matter and conflicts with the applicable decisions of this Court.

Petitioner brought this action in the United States District Court, Southern District of New York, on or about March 31, 1985, under 42 USC 1983,

alleging that respondents terminated his employment with them because of his exercise of his right to free expression. The District Court, on June 17, 1985, dismissed the complaint on grounds of prior adjudication in the New York State Courts. On January 13, 1986, the Court of Appeals affirmed that judgment on grounds that the state courts necessarily decided the claim by fining that respondents acted in good faith based on petitioner's "unsatisfactory" job performance.

ARGUMENT: THE NEW YORK STATE COURTS' FINDING DOES NOT REACH PETITIONER'S FIRST AMENDMENT CLAIM.

The decision of the Court of Appeals in this case conflicts with the decision of the Eighth Circuit Court of Appeals on the same matter and conflicts with the applicable decisions of this Court.

First, according to the decisions of the Eighth Circuit and of this Court, a civil rights claim brought under 42 USC 1983 is not necessarily decided by the finding that the defendants acted in good faith.

Second, according to the decision of this Court, in order to necessarily decide a claim of wrongful discharge in violation of First Amendment rights, a court must determine, first, whether the plaintiff's conduct was constitutionally protected; and, second, whether that conduct was a motivating factor in the discharge. In petitioner's case, the New York State Courts reached neither of these issues.

Good Faith Argument: In Atcherson v. Siebermann, CA Iowa, 605 F.2d 1058, the Court of Appeals sustained a claim

alleging violation of plaintiff's right to free expression in the face of a finding that defendant had acted in good faith. Clearly, in the mind of the Court, this finding did not necessarily decide the free expression claim.

In Gomez v. Toledo, 446 US 635, 100 S.CT. 1920, 64 L.Ed.2d 572, this Court held that 42 USC 1983 does not require a plaintiff to allege bad faith in order to state a claim for relief. Since such an allegation is unnecessary, it follows that a Section 1983 civil rights claim is not necessarily decided by the finding that defendants acted in good faith.

This Court in Gomez affirmed its prior holdings that a finding that public officers acted in good faith supports a qualified immunity from damages liability under Section 1983. These holding leave

open the key issue in a Section 1983 claim: Whether defendants, acting under color of state law, deprived the plaintiff of a federal right. In petitioner's case, the New York State courts did not reach that issue.

First Amendment Argument: In Mt. Healthy v. Doyle, 429 US 274 (1977), this Court held that, in a free expression claim, the initial burden was "properly placed on the respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor' - or ..that it was a 'motivating factor'" in the employer's decision to terminate his services. Once that burden is carried, the Court must then determine whether the employer "would have reached the same decision..even in the absence of the protected conduct." (citing other cases) In the instant case, the New York Courts

addressed none of these issues. They did not determine whether respondents' finding of "unsatisfactory" performance and their discharge of petitioner was motivated by petitioner's constitutionally protected conduct. And they did not determine whether the employer would have reached the same decision absent the protected conduct. Not having reached these key issues, they could not have necessarily decided petitioner's free expression claim.

THE NEW YORK STATE COURTS DENIED PETITIONER DUE PROCESS BY DENYING HIM THE RIGHT TO CARRY HIS BURDEN OF PROOF ON HIS FIRST AMENDMENT CLAIM.

This Court has consistently held that preclusion applies where the state courts have recognized the constitutional claims asserted and provided full and fair procedures for determining the. (Migra v. Warren School District, ____US ____; 104

S.CT. 892; ____L.Ed.____ (1984), Allen v. McCurry, 449 US 90; 66 L.Ed. 2d 308; 101 S.CT. 441 (1980) and cases cited therein). In the instant case, preclusion should not apply since the New York State Courts denied petitioner the right to carry his burden of proof.

The District Court found that petitioner adequately pleaded his First Amendment claim in his state court petition. (District Court Endorsement, p.1) Respondents denied this claim in their answer, (#1), thereby joining an issue of fact on which, under both New York law and the decision of this Court, petitioner is entitled to trial.

New York law (CPLR 7804) provides: "If a triable issue of fact is raised...it shall be tried forthwith."

In Mt. Healthy v. Doyle, supra, this Court held that the burden was placed on the plaintiff to show that his conduct was constitutionally protected, and that this conduct was a motivating factor in his discharge. In the instant case the state courts, by denying petitioner a trial, denied him the right to carry his burden of proof on these issues.

CONCLUSION: THE PETITION SHOULD BE GRANTED

SUPREME COURT - STATE OF NEW YORK

SPECIAL TERM, PART DUTCHESS COUNTY

Present: Hon. Theodore Dachenhausen, Jr.

In the Matter of the application of MICHAEL CARDO for a judgment pursuant to CPLR Article 78

Petitioner,

-against-

JOSEPH A. MURPHY, JR., et al.,

Respondents.

Index Number 4927, 1983

The following papers number 1 to 32 read on this petition for a judgment pursuant to Article 78 of the CPLR reviewing the determination made by respondents and motion for summary judgment.

Upon the foregoing papers it is ordered and adjudged that this petition is denied. "It is a general rule that a

nontenured public employee may be discharged without a hearing in the absence of proof...that the discharge was arbitrary or capricious or in bad faith" (Matter of Salvatore v. Nasser, 81 AD2d 1012, citing, Matter of Anonymous v. Codd, 40 NY2d 860; Matter of Talamo v. Murphy, 38 NY2d 637; Matter of Brathwaite v. Manhattan Children's Psychiatric Center, 70 AD2d 810). Where, however, the discharge is for reasons which may cast a stigma upon the employee's good name, reputation, honor or integrity, he is entitled to a hearing to refute the charges against him (Board of Regents v. Roth, 408 U.S. 564).

Here, there has been no showing made that petitioner's discharge was arbitrary, capricious or in bad faith. Further, despite petitioner's efforts to bring his

case within the ambit of the Roth exception, there has been no showing made that petitioner's discharge was for a reason that would cast a stigma upon petitioner's good name, reputation, honor or integrity.

Petitioner was discharged because he failed to perform his duties in satisfactory fashion. Thus, he is not entitled to a hearing (Matter of Perry v. Blair, 49 AD2d 309).

In view of the foregoing determination, the remaining causes of action, to the extent they are properly raised in this special proceeding, must fail and the motion for summary judgment must be denied as moot.

Dated: White Plains, New York
December 20, 1983

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on October 9, 1984.

In the Matter of Michael Cardo,

Appellant,

v

Joseph A. Murphy, Jr., as Personnel Director, New York State Department of Correctional Services, et al.,

Respondents

ORDER ON APPEAL FROM JUDGMENT.

In the above entitled cause, a proceeding pursuant to CPLR article 78 to review a determination of the respondent Director of Personnel of the New York

State Department of Correctional Services terminating petitioner's employment at Green Haven Correctional Facility, the petitioner, the above named Michael Cardo, having appealed to this court from a judgment of the Supreme Court, Dutchess Dounty, dated December 20, 1983, which denied the application and denied petitioner's motion for summary judgment as moot; and the said appeal having been submitted by Michael Cardo, appellant pro se and submitted by Vida Alvy, Esq., of counsel for Robert Abrams, Attorney General, pro se and for respondents Murphy, Mosher and Bernstein, due deliberation having been had thereon and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously affirmed, with costs.

Enter: Irving N. Selkin

Clerk of the Appellate Division.

S-September 6, 1984

104 AD2d 884

2308E

In the Matter of Michael Cardo, appellant, v Joseph A. Murphy, Jr., as Personnel Director, New York State Department of Correctional Services, et al., respondents.

Michael Cardo, Yorktown Heights, N.Y., appellant pro se.

Robert Abrams, Attorney-General, New York, N.Y. (Arlene Silverman and Vida Alvy of counsel), respondent pro se and for respondents Murphy, Mosher and Bernstein.

In a proceeding pursuant to CPLR article 79 to review a determination of the respondent Director of Personnel of the New York State Department of Correctional Services terminating petitioner's employment at Green Haven Correctional Facility, the appeal is from a judgment of the Supreme Court, Dutchess County (DACHENHAUSEN, J.), dated December 20, 1983, which denied the application and denied petitioner's motion for summary judgment as moot.

Judgment affirmed, with costs.

Petitioner pro se, claims on appeal that he is entitled to a so-called name-clearing hearing, because of the stigma attached to his dismissal. "Although a protectible liberty interest may arise in such a situation (Board of Regents v Roth,

[408 US 564, 573], no hearing is required unless the reasons for the discharge could be said to affect petitioner's 'good name, reputation, honor or integrity' (id.) and such reasons are publicly disclosed by respondents (Codd v Velger, 429 US 624, 628; Bishop v Wood, [426 US 341, 348])" (Matter of Carter v Murphy, 80 AD2d 960, 961; see Matter of Thomas v New York Temporary State Comm. on Regulation of Lobbying, 83 AD2d 723, affd 56 NY 2d 656). A review of the record indicates that the reasons articulated for petitioner's discharge were not stigmatic within the meaning of Roth (Matter of Ause v Regan, 59 AD2d 317). Moreover, petitioner failed to allege public dissemination by respondents of the reasons for his dismissal. Therefore, we find that petitioner was not entitled to a name-clearing hearing.

Further, we find petitioner's argument that he raised issues of fact entitling him to a trial to be without merit. Inasmuch as petitioner was a probationary employee, it was permissible to terminate his employment "without a hearing and without specific reasons being stated and, in the absence of bad faith, the determination must be upheld (Matter of Talamo v Murphy, 38 NY2d 637; Matter of Sargeant v Director, Brooklyn Developmental Center, 84 AD2d 843, affd 56 NY2d 628; Matter of Sachs v Board of Educ., 71 AD2d 898, affd 50 NY2d 830)" (Matter of Ostoyich v State of New York, 99 AD2d 839). A review of the record supports the conclusion that petitioner's performance was unsatisfactory and establishes that his discharge was made in good faith (see Matter of King v Sapier, 47 AD2d 114 116, affd 38 NY2d 960). We, therefore,

conclude that the termination of petitioner's employment was not arbitrary or capricious. Finally, we note that petitioner, as a probationary employee has failed to establish a property interest in continued public employment deserving of due process protestion. Accordingly, we affirm Special Term's judgment.

THOMPSON, J.P., WEINSTEIN, BROWN and BOYERS, JJ., concur.

UNITED STATES DISTRICT

SOUTHERN DISTRICT OF NEW YORK

- -

MICHAEL CARDO,

Plaintiff

-against-

JOSEPH A. MURPHY, JR., as Personnel Director, New York State Department of Correctional Services and MICHAEL MOSHER, as Special Subjects Supervisor, Green Haven Correctional Facility,

Defendants,

- -

CIVIL 2503CLB

JUDGMENT

- -

Defendant(s having moved for an order pursuant to Rule 12(b) (6) of the F.R.Civ.P., and the said motion having come before the Honorable Charles L. Brieant, United States District Judge, and the Court thereafter on June 17th, 1985, having handed down its endorsement granting the said motion, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed, and that all relief is denied. No costs.

Dated: June 17, 1985

White Plains, N.Y.

Raymond F. Burghardt

Clerk

Endorsement

MICHAEL CARDO, Plaintiff v. JOSEPH A. MURPHY, JR., As Personnel Director, New York State Department of Correctional Services and MICHAEL MOSHER, As Special Subjects Supervisor, Green Haven Correctional Facility, Defendants.

85 Civ. 2503-CLB

1. The within motion to dismiss the complaint on the basis of res judicata is granted.

2. Plaintiff Michael Cardo, appearing pro se, filed this action on March 31, 1985, claiming relief under 42 U.S.C. § 1983. Mr. Cardo alleges that he was wrongly terminated from his employment in violation of his

rights to free expression under the United States Constitution.

3. Mr. Cardo previously asserted this allegation in New York State court proceedings. The Supreme Court, Dutchess County, adjudicated the complaint (Index No. 4927/83), and all state appeals have been exhausted.

4. Plaintiff argues that he is not barred from relitagating the First Amendment issue because (1) the state courts did not address this issue, and (2) even if the state courts had considered the First Amendment issue, the determination of that claim was not essential to the state court's judgment.

5. Although plaintiff may be correct in that the state courts provided no specific ruling on plaintiff's First Amendment claim, the fact is that the state court complaint adequately pleads this claim. (Article 78 Petition ¶¶ 15-18). Under the authority of Migra v. Warren School District, 104 S.Ct. 892 (1984) and Allen v. McCurry, 449 U.S. 90 (1980), federal constitutional issues actually litigated in state court proceedings cannot be relitigated in federal court.

6. Under the recent decision by the Court of Appeals for this Circuit Heimbach v. Chu, 744 F.2d 11 (2d Cir. 1984), cert. denied, 105 S.Ct. 1842 (1985), the federal courts should follow New York's "transactional:

approach to res judicata, which precludes relitigation of all claims which could have been asserted under the same factual allegations. Since Mr. Cardo actually raised the free expression claim in his state court action, this Court cannot reexamine the same issue in a § 1983 action, even if the state court did not actually pass upon it. We must give the New York court decision and judgment the same preclusive effect that New York courts would accord to them.

7. Accordingly, defendants' motion to dismiss the complaint is granted.

8. The Clerk is directed to enter a final judgment that all relief shall be denied. No costs.

So Ordered.

Dated: White Plains, New York

June 17, 1985

_____

Charles L. Brieant

U. S. D. J.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Present: HONORABLE WILFRED FEINBERG, Chief Judge; HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE GEORGE C. PRATT, Circuit Judges.

- -

MICHAEL CARDO,

Plaintiff-Appellant,

-against- 85-7561

JOSEPH A. MURPHY, JR., et al.,

Defendants-Appellees.

- -

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United

States District Court for the Southern District of New York, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

This is an appeal from a judgment of the United States District Court for the Southern District of New York dismissing appellant's suite under 28 U.S.C. § 1983 because it was barred by the doctrine of res judicata. Appellant claims that he was terminated from his state job in violation of his First Amendment rights. However, this claim was raised in prior state court litigation. Although the state court did not specifically mention

the claim, it was necessarily decided against appellant by the court's finding that "his discharge was made in good faith" on the basis of his "unsatisfactory" performance on the job. See Murphy v. Gallagher, 761 F.2d 878, 881 (2d Cir. 1985).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

UNITED STATES CONSTITUTION, AMENDMENT ONE:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN, SECTION ONE:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of live, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

NEW YORK CIVIL PRACTICE LAW AND RULES, SECTION 7804:

If a triable issue of fact is raised...it shall be tried forthwith.